Supreme Court, U.S.
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No. 94-1762

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

SALVATORE MORETTI,
Petitioner

v.

LOUIS J. DINICE, AND TIMOTHY J. SULLIVAN,
Respondents

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Third Circuit

REPLY BRIEF ON BEHALF OF PETITIONER, SALVATORE MORETTI

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June 3, 1995

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POINT ONE

PETITIONER PRESENTED INSTANCES OF VIOLATIONS OF THE CANONS OF JUDICIAL ETHICS BY DINICE TO THE FEDERAL TRIAL COURT AND THE COURT OF APPEALS, WHICH WERE ACTIONABLE UNDER THE 1947 NEW JERSEY CONSTITUTION'S REVISED ADMINISTRATION OF THE COURTS.

Dinice maintains at p. 9 of his brief in opposition to the granting of certiorari that, "in the Petition for Certiorari, Petitioner contends for the first time that the 'theory of absolute immunity...was rendered moot by the legislative adoption of the 1947 N. J. constitution' (Petition for Certiorari, p. 21). Petitioner's new contention on certiorari should not be reviewed because it was not presented to and decided by the Circuit Court of Appeals."

Zimmerer as a member of the New Jersey bar is required to know the history of the state constitution, and its interpretation on the subject of the practice of law by judges and lawyers. His allegation that a suit against a judge, Dinice, does not touch upon such issues is ill-advised. He is directed to the cases cited in the petition for certiorari for the interpretation of the constitution as it relates to judicial discipline, and removal.

Petitioner directs his attention to footnote 50 contained in Spare the Rod and Spoil the Judge? by Paula Abrams, Depaul L. Rev. v.41, p. 59, which states as follows:

Fn. 50. This thread (a drive to improve the administration of the court system beginning in the twentieth century, in which the Model Judicial Act provided for a judicial council to remove from office judges based on misconduct or incapacity) was taken up by the states in revising their court systems. In 1947 New Jersey amended its constitution to revise its article on the judiciary and establish a new unified court system that became a model for court reform throughout the country. The New Jersey 'plan' established a state-wide managerial court organization under the authority of the chief justice of the New Jersey Supreme Court. The New Jersey Supreme Court made the American Bar Association Canons of Judicial Ethics binding on judges and used its Bar disciplinary authority to discipline judges. The New Jersey expreience further contributed to the belief that the judiciary should be responsible for discipline of judges. Today 47 states and the District of Columbia have created discipline systems that provide for discipline and removal either by a judicial branch or an independent commission. Most of these states established disciplinary authority by constituional amendment."

This law review discusses the federal system for the removal and disciplining of Article III judges who are otherwise protected by the United States Constitution. 28 U.S.C.S. Section 372 states in relevant part at (c)(1) that:

"Any person alleging that a cir-

cuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to dischage all the duties of office by reason of mental or physicial disability, may file with the clerk of the court of appeals for the circuit a writen complaint containing a brief statement of the facts constituting such conduct. In the interests of the effective and expeditious administration of the business of thecourts and on the basis of informmation available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, identify a complaint for purpose of the subsection and thereby dispense with filing of a written complaint."

The Code of Conduct for United States Judges follows:

Canon 1. A Judge Should Uphold the Integrity and Independence of the Judiciary.
Canon 2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities.
Canon 3. A Judge Should Perform the Duties of the Office Impartially and Diligently.
Canon 4. A Judge May Engage in Extra-Judicial Activities to Impove the Law,

the Legal System, and the Administration of Justice.
Canon 5. A Judge Should Regulate Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Duties.
Canon 6. A Judge should regularly file reports of compensation received for law related and extra-judicial activities.
Canon 7. A Judge should refrain from poitical activity.

Note that Canon 6 in the New Jersey Code of Judicial Conduct for 1993 differs as follows:

Canon 6. A Judge Should Not Receive Compensation for Quasi-Judicial and Extra-Judicial Activities.

The social scientific reasons for the change in the disciplining of judges is set forth in the November, 1993 issue of the University of Pennsylvania Law Review, vol. 142, no. 1. As that law review notes at its Foreword: The Law of Federal Judicial Discipline and the Lessons of Social Science, by S. B. Burbank and S. Jay Plager, p. 2 "[u]ntil 1980, the law of federal judicial discipline was to a great extent the law of impeachment. In the absence of any impeachment since 1936, it was not unreasonable to ask whether the only constitutionally prescribed process for imposing discipline on Article III judges was adequate to serve the needs of a nation, and of a judiciary, quite different from that contemplated by the framers and ratifiers of the Constitution....(p. 3) The Judicial

Councils Reform and Judicial Conduct and Disability Act of 1980 was designed to help the judiciary deal fairly with problems of misconduct and disability not requiring the awesome power of impeachment, and to help Congress when proceedings under the Act revealed a need for the exercise of that power."

Although Mr. Zimmerer contends that Dinice is protected by absolute immunity, petitioner maintains that the foregoing legislative and constitutional enactments have modified the rule of absolute immunity. As Abimbola A. Olowofoyeku, in SuingJudges: A Study ofJudicial Immunity, states, p. 217, "[t]he sum, then, of this book is that the solution to the problems raised by the need to protect honest judges while at the same time ensuring that the less conscientious ones pay for their misdeeds lies not in maintaining the rule of absolute immuity but in a carefully worked out rule of qualified immunity ....The general rule should be one of immunity, with exceptions for injurious acts prompted by malice,/[218] fraud, corruption, conspiracy, and for acts occasioned by gross negligence. Procedural and other safeguards should be introduced (legislatively) to prevent abuse." (cf.Note,Liability of Judicial Officers Under Section 1983, Yale Law Journal, v. 79, p. 322 (1969).

The jurisdicitonal statement set forth in the complaint filed in the federal trial court included the disbarment of petitioner's attorney by the N.

J. Supreme Court, as well as the lack of accountability of state court judges when confronted with long term problems of housing.

POINT TWO

PETITIONER DISCUSSED POINT BY POINT THE INSTANCES OF JUDICIAL MISCONDUCT OCCURRING BELOW AT BOTH THE THRID CIRCUIT COURT OF APPEALS STAGE AND AT THE FEDERAL DISTRICT TRIAL LEVEL, WHICH PROVE THAT THE SANCTIONS IMPOSED ARE UNWARRANTED AND EXCESSIVE.

Dinice argues for denial of the petition for certiorari because (p. 9 of his brief in opposition to the granting of certiorari): "in the Petition for Certiorari, Petitioner contends for the first time that the 'theory of absolute immunity...was rendered moot by the legislative adoption of the 1947 N. J. constitution' (Petition for Certiorari, p. 21) Petitioner's new contention on certiorari should not be reviewed because it was not presented to and decided by the Circuit Court of Appeals."

Consider that the Petitioner submitted a brief to the United States District Court Judge Lifland (p. 10-13) (copy to Robert Zimmerer (Dinice) and the Attorney General of New Jersey (Sullivan) on April 24, 1993 which discussed in detail the dissent in Briscoe v. LaHue, 103 S.Ct. 1108 (1983), which dissent by Justice Marshall notes at p. 1130, "to assume that Congress, which had enacted a criminal sanction directed against state judicial officials, intended sub silentio to exempt those same officials from the civil counterpart approaches the incredible." At p. 1129, Justice Marshall notes that "[t]his Court (the United States Supreme Court) has from time to time read

Section 1983 against the 'background' of common-law tort liability. Far more pertinent to this case, however, is the backgournd provided by the 1866 Civil Rights Act. Representative Bingham, who had introduced the amendment to substitute civil liability for criminal liability in the 1866 Act, had become chairman of the House Judiciary Committee by the time of the 42nd Congress. Senator Trumbull, the Senate sponsor for the 1866 Act, was chairman ofthe Senate Judiciary Committee in 1871. Representative Shellabarger, who had participated in the debates on the 1866 legislation, drated the 1871 Act...Of all the measures in the Ku Klux Klan Act, Section 1 generated the least controversy since it merely provided a civil counterpart to the far more controversial criminal provision in the 1866 Act."

Petitioner at p. 14 stated, "the first ten amendments to the United States Constitution speak eloquently to the issues cited herein...These issues were all cited to in the jurisdictional statement, as well as in the habeas corpus prepared, Under the circumstances where even the water bill leads to incarcearation, such documents must be fresh in mind for tenants and management are similarly situated."

As to whether the Canons of Professional Conduct were before the United States Court Judge Lifland deciding the case of Moretti v. Dinice and Sullivan when the case of Moretti v. Hackensack

Water Co. was heard before Judge Dinice, and State of New Jersey v. Stedtler was heard before Judge Dinice (as to her arrest in Hackensack), petitioner submitted a brief on June 17,1993, entitled, Brief in Support of Vacating of Judgements Due to Conflict of Interest of Ellen L. Kobitz, J.S.C., (in the Special Civil Part cases, Bergen County) DC-705907-92, DC. 4327092, SC-585-93. Koblitz was the deputy head of the public defenders office of Bergen County in charge of defending Stedtler before Judge Sullivan, respondent within, and Petitioner submitted two habeas corpus motions seeking release of Stedtler, filed with Judge Sullivan and the state of N.J., and filed with Judge Sullivan and the Federal District Court in Newark. Kobitz was a defendant in the companion case of Moretti v. State of New Jersey, Ellen Kobitz, et. al., (U.S. District Court, Newark, N. J. D.C.93-5577, C.A. No. 94-5171, U. S. Supreme Court No. 94-1441, (Petition for Certiorari denied April 17, 1995). That brief was part of the "Appendix Opposing Grant of Motion to Dismiss Complaint Against Louis J. Dinice under Fed. R. Civ. P.11 & 12(B)", which appendix was submitted September 14, 1993 to Judge John Lifland, copies to Robert Zimmerer (Dinice) and Patrick DeAlmeida (Sullivan). The letter of transmittal states in part:

Re: Salvatore Moretti v. Louis J. Dinice, and Timpthy J. Sullivan, Case Number 93-528 (JCL).

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"For the last three weeks I have been delivering messages to the court about the upcoming motion to dismiss involving Louis J. Dinice, and the prior motion relating to his co-defendant.

"For example, I produced a two hundred page appendix on the matter involving both Dinice and Sullivan which material has just come available to me. I hand delivered this to the court on September 13, 1993, as I said I would on September 9, 1993 via telephone conversation with your chambers.

"On September 13, 1993 (the return date of the motion to dismiss) I arrived at 9:10 a.m. and once again attempted to go to your courtroom. The courtroom was locked, guarded by an intercom connected with a voice which delared, 'the judge is not here today. There will be no oral argument on the motion involving Louis Dinice. The other attorneys have not been notified. The motion will be decided on the papers.'

"My response to the foregoing was, attorneys by certified mail that I was requesting oral argument, I must have oral argument."

"Despite the foreging, oral argument was not forth-coming. I went to the Clerk' office on the same floor as Judge Lifland's courtroom and requested that my 200-page appendix be stamped received - I had delivered seven (copies) already to the court. The Clerk said he would not

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do so since those papers went directly to the judge considerng the motion. I rang the telpehone intercom to Judge Lifland's chambers and the anserer said they would not stamp the appendix received. They said go to the clerk....I went back to the clerk, and the clerk indicated he was not able to stamp the appendix received. I returned to the Judge's intercom and the answerer said go back to the clerk a third time.

"Clearly, no one took responsibility in this matter... In fact, the opinion of the court is dated September 13, 1993.

"This is the identical approach as occurred with the Sullivan motion to dismiss, and it is clear from reading the opinion of the court that material was omitted. I was advised to write to request oral argument. This constitutes my demand for reconsideration of both motions to dismiss along with consideration of material which I expect to receive momentarily.

"By copy of this letter, I am serving notice upon my adversaries that I seek oral argument in the above two motions to dismiss, and for the reasons set forth. Neither opposing party has answered interrogatories or deposition questions, so there is no issue of vexatious litigation involved. I need not address the practice of trying jury trials on the papers without the presence of the jury or of awardng legal costs on the same basis since there has been no trial upon which to base this interpretation, but

that is an issue as well."

The appendix above noted contains:
1. Answer to Municipal Water-Shut-off Complaint, Aug. 25, 1992, pp. 1-24

2. Transcript of Proceedings before Judge Dinice, Docket No. C-92-3016. Aug.-Dec.,1992. pp.25-142.

3. Brief in Support of Vacating ofJudgment due to Conflict of Interest of Ellen L. Koblitz, (an associate of Judge Sullivan), plus certification. June 17, 1993, pp. 143-200.

Koblitz supplied public defenders to petitioner's tenant, Stedtler, while she was incarcerated in the Bergen County jail. These pubic defenders represented Stedtler before Judge Sullivan. Inadequate representation was evident, and when Judge Dinice tried Stedtler on municipal charges stemming from the break-in at her apartment at 397 Park Street, Hackensack, three blocks from the municipal court and eight blocks from the county court house, Dinice tried the case (the prosecutor, Henry Amoroso, was defendant in the companion case, Moretti v. State of New Jersey, et al.D.C. 93-5577, C.A. C.A. No. 94-1474, Supreme Court Petition No. 94-1441. Note from point one of the argument the citing of the Code of Judicial Conduct. (Appendix p.148 et. seq.):

"During the period of (Stedtler's) incarceration plaintiff-within not only

was advised by the BCBSS (Bergen County Board of Social Services) that the incarceration was not unfavorable to them (they had placed the tenant at Park Court Apartments, and had terminated subsidy payments, without just cause). They failed to advise of any prior criminal record of the tenant, but had prevailed upon plaintiff within to offer testimony against the tenant in their behalf.

"It is clear that Koblitz knew or should have known of this conflict of interest when appearing as a judge transferred from her position with the government as Deputy with the public defender's office. Canon 3 of the Code of Judicial Office provides as follows.
Canon 3. A judge should perform the duties of judicial office impartially and diligently.

APPLICABILITY...
"The Code of Professional Responsibility for Lawyers has also been violated by Koblitz at RPC 1.11, which states as follows:

RPC 1.11 Successive Government and Private Employment....
"In the case sub judice, the judge was deeply involed in getting confidential information about the arrest at Park Court Apartments on May 1, 1993. (The tenant remains in jail as of June, 1995) Claims that after that extended period of time no privileged information existed biasing the (newly transferred from the public defender's office) judge with

respect to Park Court Apartments and its management is incredible. [Koblitz sanctioned petitioner $2,070.40 under the frivolous litigaiton statute for seeking payment from a tenant, Fields, who admittedly owed $3,000 back rent, found on behalf of the Hackensack Water Company for $6600, and awarded Ballard $650, despite the fact that Ballard was never a tenant but
sued to get her 'security' back]."

Petitioner also cited to Rules of Professional Conduct, 1.9, conflict of interest: former client, RPC 1.7 Conflict of Interest: General Rule, and RPC 1.10, imputed disqualifiation, General rule.

Note that when this appeal went to the Court of Appeals, petitioner filed a certification to stay imposition of sanctions, citing hardship. At page 12 of his January 20, 1994 certification, he stated, "I have not been able to hire a maintenance staff due to the on-site problems. This has resulted in my having to do all maintenance work onsite for the past five years, requiring in excess of 100 hours of work per week. Even contract labor cannot come to the property due to the demands made by the City of Hackensack and the County of Bergen through their officials. The inefficiency of having doctoral candidates do janitorial work is a jury question, but it has not been addressed by Judge John Lifland in the above cited opinions, for reasons which cannot readily be disclosed. Filing late papers due to snow removal and

emergency repairs is a continuing problem of this life style which results from allowing collegiate stype debates in the judicial forum. I expect that it will be shown to be a pervasive problem of opinions resulting from the briefs permitted by Patrick DeAlmeida (Sullivan) and Rovert Zimmerer (Dinice), neither of whom held evidential hearings disproving my statements."

Respondent Dinice claims that the issue of violations of the Canons of Judicial Conduct were not before the trial court or the Court of Appeals below. The foregoing material shows that they were. In addition, on March 17, 1994, petitioner filed with the U. S. Court of Appeals for the Third Circuit a twenty-four page brief, with copies to Robert Zimmerer (Dinice), and Patrick DeAlmeida (Sullivan), which address the violations specifically as to Dinice being both a judge and a practicing New Jersey lawyer with a Hackensack law office. At page three, petitioner cites to New Jersey Court Rule 1:15, Limitation of Practice of Attorneys, to wit that "an attorney who is a judge required to devote his full time to his judciial duties shall not practice law. Dinice received $49,000 per year as the Hackensack magistrate, plus additional salaries from South Hackensack and Little Ferry, resulting in over $60,000 annual judicial salary. In addition, he occupied a law office at 433 Essex Street, Hackensack. Point One squarely addresses this con-

flict at page 6 of the brief, which discusses constitutional violations in a municipality under 42 U.S. C. Section 1983 resulting from its failure to train municipal employees. At p. 8 the brief notes that [Dinice] has no obligation to act without using the information leaked to him from confidential sources. It is this problem of multpile hear-say which the judicial system strenuously obects to. Judicial immunity exists because the judge per se is self-correcting. The traditional protections of judicial office are missing when the judge acts as Dinice, full time judge and full time lawyer... [D]id [Dinice] act as a business-man who owns 433 Essex Street, and has a law degree? Clearly, the complaint maintains that the later was his motivation. This is the typical lawyer who acts in his best interests while owning and managing buildings in the city, his own and others who come before him in the municipal court. Consider that in the real world of high tenant turnovers, where Dinice tries to maneuver in to represent tenants (e.g. Beavers), he is clearly functioning outside his jurisdiction. He is in conflict when he shuts down the water at plaintiff-appellant's [petitioner's] apartment house, forcing Stedtler out of her apartment there, and then arrests her on a drug chage. He has concealed a breaking and entry, and instead turned it into a Big Apple (New York City) crime-caper." Point Two of the brief squarely addresses the issue of Judge Dinice operating outside the tradi-

tional role of a judge and thereby losing absolute immunity "because he is in violation of Canon 7 of the Code of Judicial Conduct: A Judge Should Refrain from Political Activity.

Quoting from p.19 of the brief, "Mr. Zimmerer represents that Judge Dinice has not violated the law, but if he has he is protected by absolute immunity...Acts such as described in the complaint when one is assaulted on the streets, or arrested without cause. Acts such as the issuance of warrants without probable cause come to mind when the Judge detailed men to occupy plaintiff's cellar lookng for "health" violations. What is this white powder here? Are there bugs living here? etc. This type of activiity is just what it appears to be - political activity. ...Given that the Special Civil Part of the Superior Court conducts eviction proceedings whereby tenants who without cause do not pay their rent are dispossessed, virtually the entire tenant popultion of plaintiff's [petitioner's] property were evicted. This constitutes the illegal practice of law under the Canons of the Judicial Code, wherein tenants are driven out of rentals, against their better judgment, and with out any relief. This is the invidious result of the failure of Judge Dinice to act within his jurisdiction."

On March 25, 1994, petitioner submitted to the Clerk of the United State District Court in Newark and to the Clerk of

the United States Court of Appeals in Philadelphia, a brief to stay the imposition of sanctions sought by Patrick DeAlmeida on hehalf of Sullivan, Petitioner argued that "judicial immunity prevails in trials, when judicial process exists. There was no trial, no pre-trial hearings; there was incarceration following search without probable cause. As such the investigatory stage was never completed. As such there is a problem whether there is a good-faith defense necessary for the shield of qualified immunity. For such immunity, the facts must be considered, but the trial court denied all hearings, thus the matter is foreclosed as far as the state is concerned."

In objection to the unreasonable and excessive sanctions imposed on behalf of both Judge Dinice and Sullivan, petitioner states at page 4 that "this case involves a real property whose assessment increasesd from $250,000 to $793,000, up $543,000 while the property was 80% vacant. This is excessive. Consider as well that residential tenancies require on-site management and maintenance staff, but both refused to work on-site due to the excessive police and fire presence, leaving ownership to work on site...The Beavers case exemplifies some of these aspects, a tenant who bounced numerous checks, resulting in jurisdiction shifting to Special Civil, but instead found-Judge Dinice willing to exceed his authority and state: "Don't pay your rent.

Let him sue, then subpoena a copy of this transcript. "This is excessive of the jurisdiction of the court.

Mr. Zimmerer (on behalf of Dinice) claims that petitioner has not alleged the sanctions imposes are excessive. Consider the hardship visited on other apartment houses on the block. The adjacent seventy-two unit building went through a bankruptcy sale after two mortgage re-castngs. Two condominium buildings suffered through two dozen sheriff sales at $100 per unit, a loss of over $1.2 million.

The common thread is lack of accountability. Consider petitioner's case pending in the New Jersey Appellate Division, Moretti v. City of Hackensack, Docket No. A-004913-94T2, wherein it was shown that when Hackensack considered water usage for assessment purposes it estimated an annual cost for water consumption at $971 per year. Upon petitioner paying $14,500 in the last nine months, he has received a shut-off notice due to insufficient payments on the water bill. Is it possible that suits appealing judicial decisions would be impossible given the losses of neighborhood buildings? Does housing suffer when judges ignore sociological facts and refuse to consider ecoonomic data such as offered in the case at bar?

CONCLUSION

The defendants' clinging to absolute judicial immunity evidences their pre-twentieth century outlook. The competent administration ofthe Canons of Judicial Conduct on both federal and state levels proves that judges can be made accountable to the people. Professional housing management cannot survive judicial inadequacies which are long term and pervasive. Judges who try to manage apartment building on the basis of legal training alone neither provide long term solutions nor win political benefits. The exclusion of economic, sociological, and eyewitness accounts preserves the status quo and results in strategic process, not civil process.

Petitioner respectfully submits that the petition for certiorari be granted. This matter should proceed to merit briefs, with the consequent overturning of the lower court judgments.

Date: June 3, 1995

Respectfully submitted,

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